1980

State of Utah v. Steven M. Johns : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH, Plaintiff-Respondent,	:	
-vs-	:	Case No. 16218
STEVEN M. JOHNS, Defendant-Appellant.	:	

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was convicted by a jury of one count of aggravated kidnapping in violation of Utah Code Ann. § 76-5-302(1)(b) (1953), as amended, and two counts of aggravated sexual assault in violation of Utah Code Ann. § 76-5-405(1)(a)(ii) (1953), as amended. The case was tried in the Seventh Judicial District Court, in and for Carbon County, State of Utah, the Honorable Boyd Bunnell, Judge, presiding. Appellant now appeals from a verdict and judgment of guilty rendered on November 28, 1978.

DISPOSITION IN THE LOWER COURT

Appellant was found guilty of aggravated kidnapping and two counts of aggravated sexual assault. Pursuant to the guilty

verdict, appellant was sententenced to a term of five years to life in the Utah State Prison.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmation of the verdict and judgment of guilty rendered in the lower court.

STATEMENT OF FACTS

On the 12th day of October, 1977, the appellant and his girlfriend, Joyce Johnson, were at the Mountaineer Club in Wellington, Utah. They were both drunk, as they had been drinking for several hours (T.9,10,133). The appellant was "fooling around all over," playing with Ms. Johnson's breast, "rubbing all over her chest and playing around with her stomach." (T.10). Sometime between 7:00 and 8:00 p.m., Ms. Johnson asked the prosecutrix, Gloria Dix, if she (Gloria Dix) would agree to take her (Joyce Johnson) to her home in Woodside in return for filling Gloria's truck with gas (T.11,20,21). The prosecutrix agreed, driving her truck around to the side of the Mountaineer Club, where Ms. Johnson "loaded" the appellant into the truck (T.21). Appellant was passed out and had been sleeping due to his high state of inebriation (T.21,120,138-139). While the appellant was being put in the truck, the prosecutrix went to buy a case of beer at Joyce Johnson's request (T.21,49,123). The prosecutrix was not drinking at the time nor had she partaken of any alcohol or drugs that day (T.15,21,46).

The three then proceeded to Mr. Johnson's aunt's house, where Ms. Johnson and the appellant had a few more beers (T.21,123-124). The prosecutrix, noticing that Ms. Johnson and the appellant were "getting pretty loose" and "kind of getting loud," "flopping all over and stuff," told them that she had to be getting back to the Mountaineer Club so that she could talk with her former husband regarding a reconciliation of their marriage (T.21-22,109-110).

Leaving Ms. Johnson's aunt's house, the prosecutrix and her traveling companions began driving towards Woodside (T.22,124). Upon arriving at Ms. Johnson's home in Woodside, it became evident that her mother did not want the appellant to spend the night at her home (T.23). The appellant then asked the prosecutrix if she would mind giving him a ride back to Wellington (T.23), to which she replied that she would take him as far as the Mountaineer Club (T.23).

The two departed for Wellington, and after having traveled approximately one-quarter to one-half mile, appellant threw his arm around the prosecutrix (T.24,140-141). She "threw his arm off" and told him that "Danny (her ex-husband) would kill him for

less than that" (T.24,141). Appellant then slid away from her and pulled a knife with a blade approximately eight to ten inches long, pushing it against her throat (T.24).[1] (Appellant, at trial, admitted pulling out a knife, but denied putting it against her throat (T.141).) He then told her to pull the truck over. She replied that she had to find a better place to pull over, whereupon he pushed the knife harder against her throat, demanding that she pull over "Right now." (T.24). She pulled the truck over and they changed places (T.24). He very threateningly demanded at the point of a knife that the prosecutrix take all her clothes off (T.25). She told him to put the knife away, but he responded by telling her to get her clothes off and not to say another word (T.25). The prosecutrix testified she did not fight back at the appellant because the knife was at her throat (T.52). She further stated that he kept trying to touch her all over, including her private parts (T.25). As he took off driving, he told her to "shut up and just do what I tell you." (T.26). He continually touched here, asking her at one point, "Have you ever been fucked in the ass." (T.26). She then questioned the appellant in a pleading

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1 The prosecutrix received a small cut from the knife on her throat. The cut bled enough to form a scab, which Danny Dix and Pat Safely (the prosecutrix's mother) later observed (T.24,25).

manner as to why he was doing this to her and asked what had she ever done to him (T.26,27). She testified at trial that she was "waiting for a chance to make a break and get to the door" (T.27). As they approached the outskirts of Wellington, appellant told her that he could not take her into Wellington because she lived there (T.27), at which time he turned the truck around, traveled about a half mile, then turned onto a dirt road and parked the truck (T.27,28). The appellant removed the keys from the truck's ignition (T.28), and began drinking more beer (T.28). He told the prosecutrix to take her tampax out (T.66). He then forced her to have sexual intercourse against her will (T.29-30,61,144). Appellant also forced her to commit sodomy, forcing her mouth onto his penis, holding and pushing her head down to the point where she was gagging (T.28,59,144). The appellant, when asked at trial as to whether or not the prosecutrix gave any objection to this type of conduct, replied: "Well, it's not an objection deal. You know, when you're in that situation, it feels better . . . to hold them down there. You know, it's a better feeling. It's part of sex." (T.144-145). He also responded, when asked at trial whether or not he had any indication that the prosecutrix was

resisting, that ". . . Yes. I had to . . . the feeling that I was going too long, yes." (T.146).

The prosecutrix testified at trial that she tried to resist this entire ordeal (T.59), but when she tried to turn away she was overpowered (T.59). She further stated that she felt as if the appellant was going to take her life (T.29,31,57,64). Each time she would resist, the appellant would hurt her even more (T.64). At one point, he told her that "all her troubles would be over" when they went to Indian Canyon (T.31, 67), and that "she had a right to be scared." (T.33). When asked why she did not try to use a knife she was carrying at the time, the prosecutrix stated that she tried to get possession of it, but was not allowed to move her hands, only to keep them at her side (T.30,31,52,58, 62). Finally, the prosecutrix stated at trial that the intercourse was against her will (T.63,64), that she objected because some man who she did not know was "making me do something against my will" (T.65) with a knife at her throat (T.71), and that the appellant never asked her if she would do anything, he just made her do it (T.69). The prosecution also testified that appellant ejaculated on her chest, and that she wiped it off with her shirt (T.30,150). This was corroborated by appellant (T.150), and by the state's witness, James Gaskill, the Director

of the Criminal Laboratory at Weber State College, who testified that he found semen stains on the chest area of the prosecutrix's T-shirt (T.114). Mr. Gaskill also testified that he had found blood stains on the crotch area of one of the T-shirts (Exhibit No. 2), and also near the bottom on the front of another T-shirt (Exhibit No. 3) (T.114,115). The blood type was type "A" human blood, the same type as that of the prosecutrix (T.115).

Following these sexual assaults on the prosecutrix, appellant drove the prosecutrix to Price, where she talked him into permitting her to go inside at the Gas-N-Go store to purchase a 7-Up (T.36). Upon entering, she told the attending lady, Joy Lott, that she had been raped and asked her to call the police (T.38, 73). Ms. Lott later stated at trial that the prosecutrix at the time of this incident was shaking--near tears (T.73), and that she (prosecutrix) broke down and started crying the minute the police arrived (T.75-76). The prosecutrix was, as Ms. Lott described, "frantic" (T.74).

Upon the arrival of the police, the appellant "took off like a shot," squealing the tires on the prosecutrix's truck as he began his evasion of the police (T.39,75,79). Several miles later, appellant was cornered by the police, got out of the truck, and ran

(T.80-81). Officer Joe Ori, one of the officers who gave chase, stated at trial that he noticed the appellant trying to take off a belt as he was driving (T.88). A knife was later found by Officer Ori on the side of the road near the driver's side of the truck which the appellant was driving (T.86,95). This knife was shown to the prosecutrix at the police station, and she stated that it did not belong to her. She had already recovered her own knife (T.94-95).

When appellant abandoned the prosecutrix's truck, he ran and hid in the woods, where he was eventually found, apprehended, and arrested by Officer Ori (T.89,90).

The prosecutrix was taken to the hospital that same night (actually early morning) where she was examined by a doctor (T.101). Margaret Robertson, a licensed practical nurse who was present during the examination, testified that the prosecutrix seemed to be very upset, very depressed, and crying (T.102-103). She also observed bruises on the prosecutrix, quite a few contusions on her neck and breast area and some abrasions around the vaginal opening as well as contusions inside the opening (T.103,104). The doctor's report confirmed this (T.103,104). The prosecutrix, at the time of the exam,

stated that they would find no sperm inside her because the appellant had ejaculated on her chest (T.107-108).

Also present at the hospital were the prosecutrix's mother and ex-husband, who both testified that they observed bruises on her breast as well as scars on her neck and scratches on her thighs (T.12,110). The prosecutrix testified that the appellant had bit her and pinched her, as one of her nipples had bled and she noticed herself badly bruised (T.39,40).

Officer Vuksinick testified that when he saw the prosecutrix at the hospital she appeared awfully upset--her eyes puffed, swolen, and very red as if she had been crying (T.82-83). Officer Ori stated that upon encountering the prosecutrix after she had been to the hospital the night she was raped, she was so shaken it was hard for her to talk (T.93).

During a pre-trial conference and in chambers, the prosecution made a motion in limine to prevent appellant from "going into prior sexual matters of the victim" (T.3). The motion was made because at the preliminary hearing, appellant's counsel, over objection by the prosecution, went into some prior sexual relationships involving the prosecutrix. Questions

such as, "Does she like to make comparisons with other men; did she like to have sex during her period" were asked, as well as questions involving whether she had been involved previously in "male sex" with other people (T.3).

The trial court granted the prosecution's motion, and in explaining to appellant's counsel its reasoning, stated:

> . . . It's the Court's opinion that--it's true you're entitled to go into her [prosecutrix's] predisposition as to general reputation, but I don't think you're entitled to go into any specific acts, whether they involve her personally or with someone else, which obviously has to be in a sexual situation. But you're limited to general reputation and general reputation means what it says, general reputation in the community, what it means to people. And you can't go beyond that in the Court's opinion. So the Court is going to grant the motion to limit any type of questions you ask--not to get into any sexual desires as far as she is concerned regarding specific acts. So you're going to be limited to general reputation.

(T.5).

The Court went on and stated further:

> . . . we're going to limit it strictly to reputation. But if you have witnesses who can testify to her general reputation in the community, then, of course, those witnesses can so testify. But until the matter of reputation is opened up by one side or the other, there can't be any questions about the prior conduct. That's the ruling of the Court.

(T.5).

The trial court later modified its order granting the prosecution's motion in limine, allowing appellant's counsel to examine witnesses and the prosecutrix relative to the sodomy charge regarding any sexual preference that the prosecutrix may have had as showing an inclination as to whether she consented or not:

> . . . The Court at this time is going to modify its order previously made in limine, in that the Court feels in a charge of sodomy, which we have in this case, that the defendant would be entitled to ask the alleged victim relative to any sexual preference that she might have, as showing an inclination as to whether she consented or not. However, the Court will retain the order relative to limiting any specific acts with any specific people on any other occasions.

(T.6-7).

ARGUMENT

POINT I

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR, UNDER THE CONTROLLING DECISIONS OF THE UTAH SUPREME COURT, THE UTAH RULES OF EVIDENCE, AND THE DECISIONS AND STATUTES OF THE MAJORITY OF OTHER JURISDICTIONS, IN GRANTING THE PROSECUTION'S MOTION IN LIMINE.

Prior to the trial on November 27, 1978, a hearing was held in chambers in which the prosecution made a Motion in Limine, asking the Court to instruct defense counsel not

to go into prior sexual matters of the victim (T.3,R.30). The reason for the motion was to prevent defense counsel from asking questions of the victim such as those asked at the preliminary hearing. Defense counsel apparently asked such questions of the prosecutrix as: "Does she (prosecutrix) like to make comparisons with other men;" and "did she like to have sex during her period." Another question asked of the victim by defense counsel at the preliminary hearing referred to a threat that the defendant said that he was "going to perform male sex on her and asked her if she had done that with other people before" (T.3).

The trial judge granted the Motion in Limine, stating that it was the Court's opinion that defense counsel was entitled to go into the prosecutrix's predisposition as to general reputation, but was not entitled to ask about any specific sexual acts (T.5) (see Statement of Facts, Respondent's Brief). The Court subsequently modified its order granting the Motion in Limine regarding the sodomy charge, allowing defense counsel to ask the victim about any sexual preferences she might have regarding whether she consented (T.6).

Appellant contends on appeal that the trial court committed reversible error in granting the Motion in Limine, thereby denying the appellant his opportunity to provide evidence as to the prosecutrix's reputation for sexual permissiveness and immoral character; evidence as

to witnesses' opinions of the prosecutrix's sexual permissiveness and immoral character; evidence as to the appellant's opinion of the prosecutrix's sexual permissiveness and immoral character based upon alleged representations made to him by the prosecutrix; evidence as to the prosecutrix's sexual habits and customs; and evidence of specific instances of behavior which establish the prosecutrix's sexual habits and customs. Such evidence is alleged by the appellant to have been critical to the issues of the prosecutrix's alleged consent and the appellant's alleged lack of criminal intent as to all counts of his criminal conduct.

Respondent agrees with appellant that the focal point of the present case is the issue of consent. Respondent submits that scrutiny of the facts as reflected in the record and adherence to existing case law as set forth by the Utah Supreme Court reveal that the trial court was correct in granting the prosecution's Motion in Limine. Furthermore, the questions asked of the appellant and his witness by appellant's counsel concerning the prosecutrix's reputation for sexual morality were unable to be answered due to a lack of knowledge in one case and an unwillingness on the part of a defense witness in the other case.

Prior to a discussion of the applicable case and statutory law, a review of some pertinent facts is necessary.

During the trial, the prosecutrix was asked on cross-examination several questions by appellant's counsel concerning her sexual desires and preferences regarding men in general as well as the appellant:

> Q. (Defense counsel): At this point in time, how long had you been divorced from Danny (prosecutrix's ex-husband)?
>
> A. (Prosecutrix): . . . Two years. . . We was thinking about getting back together, maybe getting married again. (T.42).
>
> * * *
>
> Q. (Defense counsel): Were there problems in that reconciliation in that you had interest in other men? (Emphasis added.)
>
> A. (Prosecutrix): No. (T.43). (Emphasis added.)
>
> * * *
>
> Q. (Defense counsel): You found Steve (appellant) attractive; didn't you?
>
> A. (Prosecutrix): I did not. (T.43).
>
> * * *
>
> Q. (Defense counsel): When you find a nice looking man, do you say in your head to yourself that: "I find this man attractive?"
>
> A. (Prosecutrix): Oh, maybe sometimes.
>
> Q. (Defense counsel): And do you also say: "I maybe would like to get it on with this man, or have sex with this person?" (Emphasis added.)
>
> A. (Prosecutrix): No, I don't. (Emphasis added.)
>
> Q. (Defense counsel): You don't do that?
>
> A. (Prosecutrix): (Indicating negatively).
>
> The Court: What was your answer?
>
> The Witness: No. (Emphasis added.)
>
> Q. (Defense counsel): When you see an attractive man, do you say: "This is an attractiv man and I would like to have intercourse with him?
>
> A. (Prosecutrix): When I see an attractive man, I look at his hair and then I comment: "He's got nice hair or he's nice looking." I have no feelings about sexual emotions with them. (T.43-4 (Emphasis added.)

* * *

Q. (Defense counsel): You say this sexual intercouse went on for hours. How many hours--how many hours?

A. (Prosecutrix): . . . a long time.

Q. (Defense counsel): You enjoyed it, didn't you?

A. (Prosecutrix): No, I didn't. It hurt me. I was bruised. He wasn't trying to be nice about it. . .

Q. (Defense counsel): Is that what offended you?

A. (Prosecutrix): No. He scared me, because I felt like he was going to take my life.

Q. (Defense counsel): You made no effort to resist, Gloria; isn't that correct?

A. (Prosecutrix): Would you with a knife that was at your throat? (T.56).

* * *

Q. (Defense counsel): To go down on him and have a penis of a man in your mouth was nothing to you; isn't that correct? (Emphasis added.)

Mr. Boutwell (prosecuting attorney): Your Honor, I object.

Ms. Taylor (defense counsel): I'm not making reference to any specific prior act, your Honor.

The Court: All right. The objection is overruled. Can you answer that?

The Witness (prosecutrix): Yes, I have done it before. (Emphasis added.)

Q. (Defense counsel): It was not new to you? (Emphasis added.)

A. (Prosecutrix): No. But only with my husband. (Emphasis added.) (T.60).

* * *

Q. (Defense Counsel): That you were on your period was not . . . That you're on your period is not necessarily a reason not to have sex; is it? (Emphasis added.)

A. (Prosecutrix): I usually don't like sex on my period. I don't do that. (Emphasis added.)

Q. (Defense counsel): Usually?

A. (Prosecutrix): Most of the time I won't. I don't like it. (T.66). (Emphasis added.)

Clearly it can be seen that from the above colloquy, appellant's counsel was allowed a wide range of latitude in the cross-examination of the victim regarding her sexual

habits as well as attitudes about men in general or the appellant. As will be shortly discussed, Utah case law prohibits cross-examination into prior specific acts, with the exception of a few qualified instances not applicable in the present case.

The following testimony was elicited from Joyce Johnson, the girlfriend of appellant:

> Q. (Defense counsel): Had you known her (prosecutrix) and known of her to the point where you would be able to make a statement with regard to her reputation in the community with regard to sexual behabior?
>
> * * *
>
> The witness (Joyce Johnson): Yes.
>
> Q. (Defense counsel): And would you state for the jury to your knowledge the reputation that she does have in the community with regards to this?
>
> Mr. Boutwell (prosecuting attorney): I'm going to object. There's no foundation and it's improper phrasing of the question.
>
> The Court: I think we have to limit it, of course, to the general reputation of as to chastity and sexual morality, as I recall--are the phrases that are used. So if you want to rephrase your question in that regard.
>
> Q. (Defense counsel): Would you make a statement with regard to chastity or her morality?
>
> The Court: Sexual morality.
>
> Ms. Taylor (defense counsel): Sexual morality.
>
> Mr. Boutwell (prosecuting attorney): Again, we're talking about knowing her socially, but not on the job--or for a while. The phrasing isn't right. 'Do you know her now socially, what's her reputation?' I don't think there's any foundation. That's my objection.
>
> The Court: All right. The objection is overruled. You may answer.
>
> Mr. Boutwell (prosecuting attorney): May I voir dire the witness out of the presence of the jury before she makes her answer?
>
> The Court: No. I think we'll leave it to cross-examination. We have [illegible] there's enough

foundation. I believe she can give her opinion as to these items.

Q. (Defense counsel): You do have an opinion?

A. (Joyce Johnson): Yes.

The Court: As to general reputation we're talking about.

Q. (Defense counsel): We realize it is your opinion and it is your own. Will you tell the jury what that is, please?

A. (Joyce Johnson): I'd rather not. (Emphasis added.)

Mr. Boutwell: Your Honor, she asked for her opinion. That is objectionable. . .

The Court: Of course, that is objectionable. We can't let her give her own opinion relative to general reputation.

Mr. Boutwell: She's got to give the opinion of society, not her opinion.

The Witness (Joyce Johnson): I don't know what the opinion of society is. (T.127-129). (Emphasis added.)

The testimony of Ms. Johnson refutes appellant's allegation that he was unable to examine witnesses as to the prosecutrix's reputation for sexual permissiveness and immoral character. Ms. Johnson did not know what the opinion of society to be. She was prohibited from giving her own opinion regarding the prosecutrix's reputation for sexual permissiveness and immoral character because of the operation of Rules 46 and 47 of the Utah Rules of Evidence,[2] as well as the case of State v.

2 Rule 46, Utah Rules of Evidence, states in full: When a peron's character or trait of his character is in issue, it may be proved by testimony in the form of opinion, evidence of reputation; or evidence of specific instances of the person's conduct, subject, however, to the limitations of Rules 47 and 48." (Emphasis added.) Rule 47, Utah Rules of Evidence, states in relevant part: "Subject to Rule 48, when a trait of a person's character is relevant as tending to prove his conduct on a specified occasion, such trait may be proved in the same manner as provided by Rule 46, except that (a) evidence of specific instances of conduct other than evidence of conviction of a crime which tends to prove the trait to be bad shall be inadmissible." (Emphasis added.)

Goodliffe, Utah, 578 P.2d 1288, 1291 (1978), wherein this Court stated in that case of forcible sexual abuse:

> Further, the accepted procedure in eliciting testimony of one's reputation as it pertains to his character or a trait of his character that is in issue is to first qualify the witness by determining if he is acquainted with the reputation of the person in question, and if so, then to have him relate what that reputation is. However appropriate it may be to prove a character trait in issue by testimony in the form of an opinion (the Court here cites Rule 46, Utah Rules of Evidence), it is not appropriate to elicit from the witness his individual opinion as to what the person's reputation is in regard thereto. (Emphasis added.)

The Court explained, referring to testimony from a defendant:

> Bare, unproven allegations or "complaints" of prior incidents of similar conduct have no relevancy to the issue of defendant's truthfulness or veracity. The admission of such evidence without further explanation could only have caused the jury to speculate about defendant's propensities to commit such crimes and confuse the issues. . . .

578 P.2d at 1290.

This Court should apply the same reasoning to a personal opinion regarding the sexual permissiveness and immoral character of the victim of a rape as was attempted to be elicited from a defendant-witness. Joyce Johnson's opinion of the victim's reputation was correctly limited because she did not know what the community's opinion was.

The record also reflects that the appellant had no basis for knowing the prosecutrix's reputation for sexual permissiveness or immoral character. The appellant

had not been in Utah very long, having just come from California (T.136). He did not have the opportunity to ascertain any opinions which the community may have had regarding the prosecutrix's reputation for sexual permissiveness or immoral character. He certainly would not have any information or representation furnished by the prosecutrix regarding her reputation, habits and customs, or sexual preferences due to the fact that he met her for the first time the night of the rape (T.20,138). Furthermore, the record reveals that there was no conversation between appellant and the prosecutrix regarding her reputation for sexual permissiveness and immoral character, her sexual habits and customs (if there in fact were any),[3] or sexual preferences. Thus, he had no foundation or basis for either knowing of the prosecutrix's reputation for sexual permissiveness and immoral character (again, if in fact there was one, and the record reveals no evidence whatsoever of any), or for forming any opinion as to her reputation, habits and customs, preferences, etc. Finally, any opinion which Joyce Johnson had regarding the prosecutrix's reputation, habits and customs, or preferences which may have been communicated to the appellant would be inadmissible via the testimony of appellant because of violation of the heresay rule. It is also noteworthy

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3 Respondent submits that most all members of the human race of the age of puberty and beyond have some sexual habits and customs, as well as sexual preferences.

that Ms. Johnson testified that she did not know the reputation in the community regarding the prosecutrix's sexual morality, thus any testimony proffered by appellant based on statements by Ms. Johnson regarding such would also be inadmissible.

Respondent thus submits that appellant was not thwarted in his cross-examination of the prosecutrix nor in the examination of any witnesses, including Ms. Johnson. There was no factual basis to form a foundation for most of the questions he wanted to ask. Those questions which were allowed were answered by Ms. Johnson and the prosecutrix, perhaps the answers not being to the liking of the appellant, but nonetheless, they were answered. The credibility of these answers, of course, was exclusively the prerogative of the jury, State v. Siebert, 6 Utah 2d 198, 310 P.2d 388 (1957), and on appeal from a criminal conviction, this Court is obliged to accept that version of the evidence which supports the verdict, which in the case at bar, was guilty on all three counts. State v. Wilcox, 28 Utah 2d 71, 498 P.2d 357 (1972); State v. Howard, Utah, 544 P.2d 466 (1975).

Case and statutory law in Utah as well as in the overwhelming majority of other jurisdictions support respondent's view that the trial judge was correct in grant-

the prosecution's Motion in Limine regarding the prosecutrix's specific conduct on prior occasions with any one man.

In Utah, the law regarding interrogation of a rape victim was originally stated by this Court in State v. Scott, 55 Utah 553, 188 Pac. 860 (1920):

> Where the defendant admits the sexual act, but contends that the prosecutrix consented thereto, and where, as here, she is of lawful age, such evidence (general reputation for chastity or prosecutrix) is relevant and material upon the question of consent. . . .

188 Pac. 864.

> [However], the authorities are very numerous, indeed the great weight of authority is to the effect, that the prosecutrix cannot be interrogated on cross-examination as to whether she had had sexual intercouse with others than the defendant. The doctrine is based upon the fact, and the great weight of authority is to the effect, that specific acts of intercourse with others than the defendant may not be shown. If it is desired to prove that the prosecutrix is a lewd woman, that may only be done by attacking her general reputation for chastity and morality, and not by showing specific acts of wrongdoing. . . .

188 P.2d 865 (emphasis added).

This Court reaffirmed the Scott principle in State v. Smith, 90 Utah 482, 62 P.2d 1110 (1936), further explaining its logic for excluding testimony concerning a rape victim's prior isolated acts of intercouse with men other than the defendant.

> In cases of rape where the prosecutrix is over the age of consent, her bad reputation for chastity is a proper matter for consideration of the jury as affecting her credibility and bearing on the probability of consent. State v. McCune, 16 Utah 170, 51 Pac. 818; 1 Wharton's Crim. Evid. 481. . . In some jurisdictions the courts hold that the prosecuting witness may be examined as to previous acts of immorality on her part as affecting her credibility as a witness [cites omitted]. There are grounds for distinction between examination of a prosecutrix as to previous conduct showing her to be a common prostitute and merely as to isolated acts of intercourse. The former conduct would indicate a low state of morals and affect credibility as a witness, while isolated acts might have no such bearing. [cite omitted.]

62 P.2d 1113.

The latest sex abuse case in Utah involving the issue of consent and the scope of cross-examination to be permitted is that of State v. Howard, Utah, 544 P.2d 466 (1975), which appellant cites in support of his argument. In Howard, the defendant picked up the prosecutrix alongside the highway, asking her if she would like to go for a ride. She accepted and they drove southward for about two hours, where the defendant turned off the main highway, driving over a hill and parking his truck. At this point the prosecutrix claimed that the defendant seized an ice pick, placed it at her throat, threatened her, dragged her from the truck and threw her to the ground, raping her. The defendant claimed that he and the prosecutrix engaged in petting and preliminaries, followed by consensual intercourse. The parties then got back in the truck and returned to Ephraim,

stopping on the way in Manti to use the restroom. When arriving in Ephraim at her cousins, the prosecutrix called her parents, telling them of the attack. She also reported the incident to a male friend, who accompanied her to the sheriff, where she gave the information upon which the defendant was arrested and charged.

This Court, after noting some inconsistencies in the prosecutrix's story as well as taking into account the trial court's sustaining of the prosecuting attorney's objection to testimony about the reputation of the prosecutrix in the locality,[4] vacated the conviction and remanded the case for a new trial. The Court was clearly correct in its ruling, for the law prior to and after Howard is that the reputation of the prosecutrix in the community for chastity is a proper matter for consideration of the jury as affecting her credibility and bearing on the issue of consent. State v. Smith, supra; State v. Scott, supra; Rules 46, 47, Utah Rules of Evidence. The trial judge in the Howard case should have permitted the defendant's witness to testify about the prosecutrix's reputation in the locality for moral character because the witness testified that he knew what the reputation was.

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4 The witness stated that he knew the reputation of the prosecutrix in the locality as to moral character. The court, after objection by the prosecution, refused to let the witness testify as to what that reputation was.

In contrast is the present case, where the appellant's witness, Joyce Johnson, testified that she did not know what the prosecutrix's reputation in the community for sexual morality was (T.127-129). Furthermore, the appellant in the present case was never asked that question either on direct or cross-examiantion. As previously discussed, appellant would not have possessed the knowledge to answer such a question as he had only just recently arrived in Utah from California (T.136), was not even living in the same community as the prosecutrix (she lived in Wellington, the appellant was staying in Helper at his sister's home (T.19,121)), and could not have received information from Joyce Johnson regarding the prosecutrix's reputation since she (Joyce Johnson) stated that prior to the night of the rape, she had not seen the appellant in 4 or 5 months (T.119,121). Thus, appellant would not have had the opportunity to learn of the prosecutrix's reputation for sexual morality in her locality of Wellington.

Respondent submits, therefore, that appellant's allegation that he was denied the opportunity to provide evidence of the prosecutrix's reputation for sexual permissiveness and immoral character as well as evidence of witnesses' opinions of the prosecutrix's sexual permissiveness and immoral character are not well founded.

The appellant was never asked such a question, and if he had, would have been unable to provide an answer as he had no opportunity to know what society's opinion may have been. The appellant's witness (Joyce Johnson) was asked about society's opinion of the prosecutrix's reputation for sexual morality, to which she answered that she did not know (T.127-129). Neither the appellant nor his witness could have testified as to their personal opinion of the prosecutrix's reputation in the community for sexual morality. State v. Goodliffe, supra, at 578 P.2d 1291.

Appellant further argues that the trial court should have permitted him to provide evidence as to his opinion of the prosecutrix's sexual permissiveness and immoral character based upon alleged representations made to him by the prosecutrix. As previously discussed in State v. Goodliffe, supra, the Utah Supreme Court has declared that "it is not appropriate to elicit from the witness his individual opinion as to what the person's reputation is in regard thereto." The Court makes this statement without qualifications or limitations, except to reinforce the validity of the declaration by stating such to be the law, "However appropriate it may be to prove a character trait in issue by testimony in the form of opinion." The Court has not made exceptions such as

appellant urges here, i.e., for the appellant's opinion evidence to be admitted because it is allegedly "based upon representations made to him by the prosecutrix." There is no evidence whatsoever in the record of any conversation between the prosecutrix and appellant regarding any alleged representations by the prosecutrix regarding her alleged sexual permissiveness or immoral character. Rule 56(1) of the Utah Rules of Evidence, states:

> If the witness is not testifying as an expert his testimony in the form of opinion or inferences is limited to such opinions or inferences as the judge finds (a) may be rationally based on the perception of the witness and (b) are helpful to a clear understanding of his testimony or to the determination of the fact in issue.

The trial judge obviously did not feel that any such testimony by the appellant regarding his opinion of the prosecutrix's alleged sexual permissiveness and immoral character based upon her alleged representations met the criteria in subsections (a) or (b) in Rule 56(1). Such a decision to preclude such testimony by the appellant is also supported by Rules 46 and 47 of the Utah Rules of Evidence, as Rule 46 allows testimony concerning a person's character or trait (when it is in issue) in the form of opinion, subject however, to Rule 47, which prohibits evidence of specific conduct other than evidence of conviction of a crime. Thus appellant's argument claiming he was prevented from introducing evidence as

to his opinion of the prosecutrix's alleged sexual permissiveness and immoral character based upon alleged representations which she made to him is not well founded based upon the record or legal authority.

Appellant's final allegation regards the trial court's limitation on the evidence appellant wished to offer as to the prosecutrix's sexual habits and customs as well as evidence of specific instances of behavior which establish the prosecutrix's sexual habits and customs.

Appellant cites Rules 49 and 50 of the Utah Rules of Evidence in support of his claim that evidence of the prosecutrix's sexual habits and customs should have been admitted. Those rules read respectively:

> Evidence of habit or custom is relevant to an issue of behavior on a specified occasion, but is admissible on that issue only as tending to prove that the behavior on such occasion conformed to the habit or custom. Rule 49.
>
> Testimony in the form of opinion is admissible on the issue of habit or custom. Evidence of specific instances of behavior is admissible to prove habit or custom if the evidence is of a sufficient number of such instances to warrant a finding of such habit or custom. Rule 50.

Respondent submits a two-fold argument. First that Rule 49 is modified by Rule 50 in that Rule 50 states there must be evidence of a sufficient number of instances of behavior before evidence of such instances of behavior can be admitted for the purpose of showing that the specified

instance of behavior in question conformed to a habit or custom. The record in this case nowhere reflects that appellant knew of a sufficient number of instances of sexual behavior regarding the prosecutrix in order to warrant a finding of any sexual habits or customs. He had met the prosecutrix for the first time the night he raped her. He had only been in Utah a short time, having come in from California, and he was not even living in the same locality as the prosecutrix. Thus, he had no basis for any first-hand knowledge concerning the prosecutrix's sexual habits or customs. Secondly, respondent submits that even if the prosecutrix did have some sexual habits and customs, their admission would have been irrelevant. The evidence conclusively demonstrated that the prosecutrix was forced to have intercourse with the appellant at the threat of a knife at her throat. She was also forced to commit sodomy--pursuant to the same threat. She had physical evidence of bruises on her body, specifically her nipples on her breasts were bleeding from being pinched, her vagina was bruised, and she had scars on her neck (T.12, 40,82,93,101-104,110). She also had a cut on her throat from the appellant's knife (T.24,25). Certainly, even if her sexual habit was to have intercourse with other men, this did not give the appellant the right to forcibly rape her and force her to commit sodomy as well as kidnap

her. As this Court stated in State v. Howard, supra, at 544 P.2d 469:

> It is not to be questioned that the fact that a woman may be of bad reputation, or that she may be known to be immoral or even completely dissolute of character does not give anyone license to forcibly violate her. . . .

The proscription of Howard would be the case in the present situation even if there was evidence of bad sexual habits or reputation on the part of the prosecutrix. But there is no such evidence. The facts are that the appellant admitted to all of the essential elements of the crimes of forcible rape and sodomy. He asserts the defense of consent, yet the record indicates that he knew that what he was forcing the prosecutrix to do was against her will (see Respondent's Brief, Statement of Facts, supra). Thus, appellant's insistence on being allowed to introduce evidence as to the prosecutrix's sexual habits and customs is not well founded.

The denial by the trial judge of appellant's request to introduce evidence of specific instances of behavior which would allegedly establish the prosecutrix's sexual habits and customs was correct and case law clearly refutes appellant's contention. Appellant cites State v. Howard, supra, as authority in support of his proposition, as well as Rules 49 and 50 of the Utah Rules of Evidence.

The applicable portion of the Court's opinion in Howard is as follows:

> **. . . though it is not proper to permit inquiry into specific acts of prior misconduct of the victim, where the critical issue is consent, and the circumstances are such that it reasonably appears that evidence concerning her moral character would have sufficient probative value to outweigh any detrimental aspects of admitting such testimony, it should be admitted.**

544 P.2d at 469.

Assuming arguendo that the last phrase in the above quoted Court's opinion "it should be admitted" refers to specific acts of prior misconduct of the victim, respondent must point out that appellant has ignored two important factors: (1) two conditions precedent to the admission of testimony regarding specific acts of prior misconduct; (2) subsequent case law to the Howard case rejecting appellant's argument.

The two conditions precedent to the admission of specific acts of prior misconduct are: (1) the critical issue must be consent (as it is in the present case); (2) "the circumstances must be such that it reasonbly appears the evidence concerning [the prosecutrix's] moral character would have sufficient probative value to outweigh any detrimental aspects of admitting such testimony." Such a determination is of course within the discretion of the trial judge, and this Court has declared that the trial court will be reversed only if he abuses that discretion,

or if the exclusion of such evidence regarding specific acts of the prosecutrix would probably have had a substantial influence in bringing about a different verdict. State v. Starks, Utah, 581 P.2d 1015, 1017 (1978). Rule 45 and Rule 5, Utah Rules of Evidence.[5] Respondent submits that allowing evidence concerning the prosecutrix's specific prior acts would not have had sufficient probative value to outweigh any detrimental

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5 Rule 45, Utah Rules of Evidence, states:

> Except as in these rules otherwise provided, the judge may in his discretion exclude evidence that its admission will (a) necessitate undue consumption of time, or (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury, or (c) unfairly and harmfully surprise a party who has not had reasonable opportunity to anticipate that such evidence would be offered. (Emphasis added.)

Rule 5, Utah Rules of Evidence, states:

> A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless (a) it appears of record that the proponent of the evidence either made known the substance of the evidence in a form and by a method approved by the judge, or indicated the substance of the expected evidence by questions indicating the desired answers, and (b) the court which passes upon the effect of the error or errors is of the opinion that the excluded evidence would probably have had a substantial influence in bringing about a different verdict or finding.

aspects of admitting such testimony. Such admission would only have created undue prejudice towards the prosecutrix, for the real issue was whether she consented on this particular occasion, not what she may have or not have done with some other man on a prior occasion. The jury could easily have been confused and misled as to the real issues, thereby "trying" the prosecutrix instead of the appellant.

Respondent also notes that appellant did not substantially comply with subsection (a) of Rule 5 of the Utah Rules of Evidence, whereby the proponent of the evidence either makes known the substance of the evidence to be offered in a form approved by the judge or indicates the substance of the expected evidence by questions indicating the desired answers. Such a procedure was not followed by the appellant. Appellant has given the Court no evidence in the record that he knew of any prior misconducts on the part of the prosecutrix. Thus, even if arguendo, the evidence was erroneously excluded, the verdict would not be reversed due to noncompliance with subsection (a) of Rule 5 and also due to the fact that the excluded evidence would not have had a substantial influence in bringing about a

different verdict as prescribed in subsection (b) of Rule 5, Utah Rules of Evidence.

The case law in Utah since the Howard case has been directly contrary to appellant's argument for admission of evidence of the prosecutrix's prior specific acts of misconduct (if there were any). In State v. Starks, supra, during the cross-examination of a witness, counsel attempted to show misconduct on the part of the witness at an earlier time in order to attack his credibility. Rejecting the proffered testimony, the Court, relying upon Utah Rules of Evidence, Rules 22 and 47, stated:

> . . . "it is clear that only previous convictions, and not previous acts of misconduct which do not result in conviction, may be used to impeach a witness' credibility."

581 P.2d at 1017. The Court further stated its reasoning:

> In the instant matter, the proffered testimony would not have any relevance to the question of guilt or innocence of the defendant. . . .

581 P.2d at 1017. Similarly, in State v. Minnish, Utah, 560 P.2d 340, 341 (1977), this Court stated:

> . . . Rule 47 (U.R.E.) definitely requires rejection of evidence of specific behavior to prove a character trait except evidence of conviction of a crime.

Even though appellant urges that the evidence of the prosecutrix's prior specific acts (he has made no such proffer of such evidence) is critical to the issue of consent, respondent submits that specific acts go to the credibility of the witness, and thus the ruling in State v. Starks, supra, would apply as well as Rule 46 and 47 of the Utah Rules of Evidence. Therefore, evidence of prior specific acts for purposes of impeachment would be inadmissible unless such acts resulted in conviction.

In appellant's brief, he has argued that a number of other jurisdictions have adopted positions similar to that contended for by appellant, and he cites

various authorities. The cases cited by appellant involving the jurisdictions of Kentucky and Texas have been modified by later enactment of statutes.[6] Similarly, other cases cited by the appellant involving the jurisdictions of Kansas, Minnesota, Nebraska, New Mexico, and Virginia were misinterpreted by appellant as being supportive of his argument, whereas they are in fact not (see Appellant's Brief, p. 9 for specific cites of those cases). The ruling in the case cited by appellant involving the District of Columbia was later changed by a subsequent case.[7]

As an example, appellant cites the case of State v. Herrera, 582 P.2d 384 (N.M. 1978), as being supportive of his argument. A close look reveals just the opposite. In that case, the defendant was charged with, among other things, criminal sexual penetration. He was convicted and appealed, claiming among other things, that the trial court erred in prohibiting questioning of the victim concerning past sexual conduct. He asserted that this prohibition

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6 Kentucky: 1976, Ky. Rev. Stat. § 510.145; Texas: 1979, Tex. Penal Code § 21.13.

7 1977, McLean v. United States, D.C. et. App., 377 All. 2d 74, wherein it was held that evidence of a victim's prior sexual relations with others and of her reputation for unchastity are not admissible on the issue of consent or for purpose of impeachment.

limited his constitutional right to confront witnesses against him. The appellant in that case also attacked the constitutionality of a procedural statute involved, which read as follows:

> 40A-9-26. Testimony--Limitations--In camera hearing--A. As a matter of substantive right, in prosecutions under sections 2 through 6 of this act [40A-9-21 to 40A-9-25 (sexual crimes)], evidence of the victim's past sexual conduct, opinion evidence thereof, or of reputation for past sexual conduct, shall not be admitted unless, and only to the extent that the court finds, that evidence of the victim's past sexual conduct is material to the case and that its inflammatory or prejudicial nature does not outweigh its probative value.
>
> B. If such evidence is proposed to be offered, the defendant must file a written motion prior to trial. The court shall hear such pretrial motion prior to trial at an in camera hearing to determine whether such evidence is admissible under subsection A of this section . . . if such proposed evidence is deemed admissible, the court shall issue a written order stating what evidence may be introduced by the defendant and stating the specific questions to be permitted.

The New Mexico Supreme Court held the statute constitutional, and further upheld the decision of the trial court, affirming the conviction of the defendant:

> . . . in our opinion . . . past sexual conduct, in itself, indicates nothing concerning consent in a particular case. This is a starting point because relevancy is not an inherent characteristic of any item of evidence, but exists only as a relation between an item of evidence and a matter properly provable in the case. [Cite omitted.]
>
> If defendant claims a victim's past sexual conduct is relevant to the issue of the victim's consent, it is up to the defendant to make a preliminary showing which indicates relevancy. . . The question of relevancy is not raised by asserting that it exists, there must be a showing of a reasonable basis for believing that past sexual conduct is pertinent to the consent issue. [Cite omitted.]
>
> * * *
>
> Absent a showing sufficient to raise an issue as to relevancy, questions concerning past sexual conduct are to be excluded. . . .

582 P.2d at 393.

Respondent takes the time to examine the Herrera case for two reasons. One, is that the case certainly does not support, as appellant contends in his brief, the proposition urged on this Court that evidence of prior particular acts of unchastity or other sexual misconduct are admissible on the issue of consent. Neither the Herrera case nor the statute in question there held such a proposition. The New Mexico Court found them to be inadmissible unless a showing of relevancy could be made. Second, the trial judge in the present case followed the rules set forth in the Herrera case. He held a hearing

in his chambers prior to trial and determined that inquiries about past sexual acts with specific men were not relevant to the issue of consent.

Even though Utah does not have a statute similar to the one in question in the Herrera case, respondent submits that this Court's holding in Howard (whereby it was said that where consent is in issue and where "circumstances are such that it reasonably appears that evidence concerning [the prosecutrix's] moral character would have sufficient probative value to outweigh any detrimental effects of admitting such testimony it should be admitted), is in essence the same as the substantive portion of the New Mexico statute, i.e., are the prior specific sexual acts relevant to the issue of consent? If so, they are to be admitted. The trial judge in the present case, as well as the judge in the Herrera case, found in the exercise of their discretion, such prior specific sexual acts not to be relevant to the issue of consent.

Most states are in agreement with Utah law either by case law or statutory law that prior acts of the prosecutrix are inadmissible on the issue of consent or to impeach credibility unless a showing of relevancy prior to trial can be made by the

defendant.[8]

Respondent submits that the trial judge was

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8 See State v. Williams, 224 Kan. 468, 580 P.2d 1341 (1978); State v. Blum, 17 Wash.App. 37, 561 P.2d 226 (1977); State v. Arizona ex rel. Pope v. Superior Court, In and For County of Mojave, 113 Ariz. 22, 545 P.2d 946 (1976). States with statutes limiting admissibility of prior sexual acts without a showing of relevancy are:

Alabama: 1977, Ala.Code § 12-21-203.
Alaska: 1975, Alas. Stat. § 12.45.045.
Arkansas:1977, Ark. Stat. § 41-1810.0.
Calif.: 1974, Calif. Evid. Code §§ 782, 1103.
Colo.: 1975, Colo. Rev. Stat. § 18-3-407.
Del.: 1974, Del. Code tit. 11 §§ 3508-3509.
Florida: 1974, Fla. Stat. Ann. § 794.022.
Georgia: 1976, Ga. Code Ann. § 38-202.1.
Hawaii: 1977, Hawaii Rev. Stat. § 707-742.
Idaho: 1977, Idaho Code § 18-6105.
Indiana: 1975, 1976, Burns Ind. Code Ann. § 35-1-32,5-1.
Iowa: 1977, Iowa Rules of Crim. Proc, Rule 20.
Kansas: K.S.A. 60-447a, Rules of Evidence, Rule 47a.
Kentucky:1976, Ky. Rev. Stat. § 510.145.
La.: 1975, La. Rev. Stat. Ann. § 15.498.
Maryland:1976, Md. Ann. Code Art. 27 § 461.
Mass.: 1977, Mass. Gen. Laws Ann. Chap. 233 § 21B.
Michigan:1974, Mich. Comp. Laws § 750.520j.
Minn.: 1975, Minn. Stat. Ann. § 609-347.
Miss.: 1977, Miss. Code Ann. § 97-3-70.
Missouri:1977, Mo.Ann. Stat. § 491.015.
Nebraska:1975, Neb. Rev. Stat. § 28-408-05.
Nevada: 1971, Nev. Rev. Stat. §§ 48.069, 50.090.
N.J.: 1976, N.J. Stat. Ann. § 2A:84A-32.1.
N.M.: 1975, N.M. Stat. Ann. § 40A-9-26.
N.Y.: 1975, N.Y. Crim. Proc. Law § 60.42.
N.C.: 1977, N.C. Gen. Stat. § 8-58.6.
Ohio: 1975, Page's Ohio Rev. Code Ann. §§ 2907.02, 2907.05.
Okla.: 1975, Okla. Stat. Ann. § 22-750.
Oregon: 1975, Ore. Rev. Stat. § 164-475.
Pa.: 1976, Purdon's Cons. Penna. Stat. § 18-3104.
R.I.: 1975, R.I. Rules of Crim. Proc., Superior Court, Rule 26.3.
S.C.: 1977, S.C. Code § 16-3-659.1.
S.D.: 1975, S.D. Comp. Laws § 23-44-16.1.
Texas: 1975, Tex. Penal Code § 21.13.
Wash.: 1975, Wash. Rev. Code Ann. § 9.79.150.
W.V.: 1976, W.Va. Code § 61-8B-12.
Wisc.: 1975, Wisc. Stat. Ann. § 972.11.
Wyo.: 1977, Wyo. Stat. Ann. § 6-4-312.

acting within his discretion in limiting the evidence which appellant sought to produce regarding the witnesses' opinions of the prosecutrix's alleged sexual permissiveness and immoral character; evidence as to the appellant's opinion of the prosecutrix's alleged sexual permissiveness and immoral character based upon alleged representations made to the appellant by the prosecutrix; evidence as to the prosecutrix's sexual habits and customs; and evidence of specific instances of behavior which establish the prosecutrix's sexual habits and customs. In addition to the cases cited, Rules of Evidence and reasoning set forth therein, respondent calls the attention of the Court to Rule 22(c)(d) of the Utah Rules of Evidence, which encompasses all that has been argued:

> As affecting the credibility of a witness . . . (c) evidence of traits of his character other than truth, honesty, or integrity or their opposites, shall be inadmissible; (d) evidence of specific instances of his conduct relevant only as tending to prove a trait of his character, shall be inadmissible.

The trial judge did not err in refusing appellant's line of examination and cross-examination. Should this Court hold otherwise, respondent submits that said exclusion was harmless and would have had no prejudicial effect on the verdict. Rule 5, Utah Rules of Evidence.

POINT II

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN DEFINING THE SCOPE OF REPUTATION EVIDENCE INTO WHICH APPELLANT'S COUNSEL WAS ALLOWED TO DELVE IN HIS EXAMINATION OF HIS WITNESS.

Appellant alleges that the trial court, in granting the prosecution's motion in limine, restricted appellant's examination of witnesses regarding the prosecutrix's reputation to her "general reputation in the community." He then alleges that the trial court, during the course of the trial, enlarged the scope of "general reputation," to include the prosecutrix's reputation as to "sexual morality," and then proceeded to define and limit the scope of reputation evidence so that the appellant was effectively denied the opportunity to examine the witness on any aspect of the prosecutrix's reputation. Appellant cites portions of the trial transcript (T. 127-129) in support of his argument.

Respondent submits that the trial judge's limitation of the examination of Joyce Johnson (appellant's witness) by appellant's counsel to her (witnesses') knowledge of the prosecutrix's general reputation in the community for sexual morality was correct. Furthermore,

respondent submits that appellant's interpretation of the colloquy on pages 127-129 of the trial transcript is purely self-serving and at best, distorted.

The law in Utah regarding the intent to which a witness may be examined regarding another's reputation is very clear, particularly in cases involving forcible sex crimes. In State v. Scott, supra, at 188 P. 855, this Court stated:

> . . . If it is desired to prove that the prosecutrix is a lewd woman, that may only be done by attacking her general reputation for chastity and morality. . . .

Emphasis added.

In State v. Smith, supra, at 62 P.2d 1113, this Court declared:

> In cases of rape where the prosecutrix is over the age of consent, her bad reputation for chastity is a proper matter for consideration of the jury as affecting her credibility and bearing on the probablity of consent. . . .

Emphasis added.

Similarly, in State v. Howard, supra, at 544 P.2d 470, this Honorable Court again stated:

> . . . the probative value of the victim's reputation as to moral character is sufficient to . . . justify the admission of such evidence.

Emphasis added.

Thus, it can be seen that in sexual abuse cases, the trial court must allow reputation evidence as to "general reputation for chastity and morality" (Scott), "bad reputation for chastity" (Smith), or "reputation as to moral character" (Howard), assuming of course that proper foundation is laid.

The question to be answered now is whether the trial judge in the present case followed the law. The record reveals that he did. The record shows that the trial judge limited appellant's counsel's examination by his witness to "her reputation in the community as to chastity and sexual morality:"

> Q. (Defense counsel): Had you known her and known of her to the point where you would be able to make a statement with regard to her reputation in the community with regard to sexual behavior?
>
> * * *
>
> The Witness: Yes.
>
> Q. (Defense counsel): And would you state for the jury your knowledge of the reputation that she does have in the community with regards to this (her sexual behavior)?
>
> * * *
>
> The Court: I think we have to limit it, of course, to the general reputation of as to chastity and sexual morality, as

I recall--are the phrases that are used. So if you want to rephrase your question in that regard--

Q. (Defense Counsel): Would you make a statement with regard to chastity or her morality?

The Court: Sexual morality.

Ms. Taylor: (Defense Counsel): Sexual morality.

(Objection by the prosecution for lack of foundation).

The Court: No. I think we leave it to cross-examination. We feel there's enough foundation. I believe she can give her opinion as to these items.

Q. (Defense Counsel): You do have an opinion?

A. Yes.

The Court: As to general reputation we're talking about. [Note: it is here obvious the court is talking about general reputation in the community as to sexual morality].

Q. (Defense Counsel): We realize it is your opinion and it is your own. Will you tell the jury what that is, please?

A. I'd rather not.

Mr. Boutwell (Prosecutor): Your Honor, she asked for her own opinion. That is objectionable--

The Court: Of course, that is objectionable. We can't let her give her own opinion relative to general opinion. (emphasis added).

Mr. Boutwell: She's got to give the opinion of society, not her opinion.

The Witness: I don't know what the opinion of society is. (Emphasis added).

(Objection by prosecutor to strike anything she has previously said regarding her personal opinion or the opinion of society).

The Court: The objection will have to be sustained, if she doesn't know what society's opinion is . . .

T. 127-129.

It is obvious from the above that the court throughout the dialogue is referring to the general reputation of the prosecutrix in the commumity for chastity and sexual morality (T. 127-128). When the court sustains the prosecutrix's objection to the witness testifying to anything other than the opinion of society, the court was referring to the opinion of the community (local society) not society at large or society as a whole, as appellant contends. Furthermore, the witness most certainly could not have given her own personal opinion as to either what she believed the reputation of the prosecutrix to be or what her personal opinion was regarding the reputation of the prosecutrix to be among the community (reputation refers to reputation for chastity and sexual morality). State v. Goodlife, supra,

578 P.2d at 1291. Had the witness stated that she knew what the reputation of the prosecutrix for sexual morality to be among the community (society), she could have testified as to that. As it was, the witness stated that she did not know "what the opinion of society" was (T. 129). Appellant attempts to show that his witness was "misguided" as to the use of the word "society," claiming that the witness thought the court was referring to society as a whole as opposed to the local community.

Respondent submits that the trial court was correct in limiting the appellant's examination into reputation evidence. The witness, as she responded at the trial, testified that she had an opinion (T. 128), regarding the reputation of the prosecutrix for sexual morality (respondent submits that she was referring to her own personal opinion), but answered in the negative when asked whether she had an opinion as to the prosecutrix's reputation for sexual morality in the community. Thus, no reversible error was committed by the trial court in limiting the examination of the witness to her knowledge of the prosecutrix's reputation for sexual morality in the community.

POINT III

THE TRIAL COURT'S FIRST AND SECOND RULINGS WITH RESPECT TO THE PERMISSIBLE SCOPE OF EXAMINATION CONCERNING THE PROSECUTRIX'S SEXUAL MORALITY WERE NOT INCONSISTENT, CAPRICIOUS OR INHERENTLY UNJUST.

Appellant misconstrues and misinterprets the ruling of the trial judge when he alleges in Point III that the court erred in allowing the appellant to examine the prosecutrix as to any sexual preference she may have had regarding the charge of sodomy. The court, originally ruling favorably on the prosecution's motion in limine by stating that appellant's counsel could "go into her (prosecutrix's) predisposition as to general reputation (for sexual morality and chastity)," subsequently modified that ruling by allowing appellant's counsel to ask the prosecutrix as to any sexual preference she might have regarding sodomy. The trial court obviously felt that this may have some bearing on the issue of consent relative to the sodomy charge (T. 6). Appellant does not argue with the later ruling, but submits that the trial court should have also allowed examination of the prosecutrix regarding any sexual preference she may have had regarding sexual intercourse. The reason for the trial court's ruling and distinction is obvious. Respondent submits that the court could almost take judicial notice that most all members of

the human race are endowed with a natural urge or tendency at one time or another to engage in sexual intercourse with a partner of the opposite sex. Certainly, so to speak, we all have a "sexual preference." So allowing the prosecutrix to be examined as to sexual preference regarding intercourse on a specific occasion with other men would have nothing whatsoever to do with whether she consented on this particular occasion. With regards to the sodomy charge, however, because it is a different type of sexual act than intercourse, perhaps not as widely preferred or accepted, it would be relevant to the issue of consent to allow examination about the prosecutrix's sexual tendencies or preferences towards such a type of sexual act (relevant of course only to the issue of consent regarding the sodomy charge).

Thus, the reason for the trial judge making such a ruling is sound and would not have prejudiced the verdict of the jury.

POINT IV

THE TRIAL COURT'S GRANTING OF THE PROSECUTION'S MOTION IN LIMINE DID NOT DEPRIVE APPELLANT OF HIS CONSTITUTIONAL RIGHT TO CONFRONT HIS ACCUSOR.

Appellant claims that through the trial court's granting of the prosecution's motion in limine, he was prevente

from presenting criminal evidence which with reasonable likelihood would have altered the verdict. He further claims that such an alleged deprivation was the equivalent of a denial of his right to confront his accusor, a right guaranteed by both the Utah and the United States Constitutions, both explicitly and implicitly, as part of due process.

The opinion of the New Mexico Supreme Court in State v. Herrera, supra, is instructive here. The court said that a defendant has no constitutional right to ask a witness questions which are irrelevant. The court there also stated that "reasonable restrictions on a constitutional right are permissible."

Similarly, the Kansas Supreme Court in State v. Williams, 224 Kan. 468, 580 P.2d 1341 (1978), stated that adequate safeguards provided for by statute which exist to control the admission of testimony of prior sexual conduct of a witness when appropriate in a particular case is not violative of the due process clause of the Fourteenth Amendment to the United States Constitution.

In conclusion, respondent submits that the evidence limited by the trial judge in the instant case was not relevant to the issue of the consent, therefore not violative of any of appellant's constitutional guarantees.

CONCLUSION

For the reasons heretofore stated, respondent submits that the trial court was correct in granting the prosecution's motion in limine; for none of the evidence contended for by appellant concerning the prosecutrix was relevant to the issue of consent on the various charges. Evidence as to the prosecutrix's reputation in the community regarding sexual morality was admissible, and so ruled the trial court.

The decisions as to the admissibility of evidence and the extent of cross-examination and examination are matters which rest largely within the discretion of the trial court. Only if this discretion is abused will his decisions be reversed on appeal. State v. Starks, Utah, 581 P.2d 1015 (1978). Further, even if some error was made in limiting examination or cross-examination, appellant has not shown that such error is prejudicial, and as such, the conviction cannot be reversed.

Respectfully submitted,

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